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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 194

JOHN WILLIAM LYNCH AND WILLIAM M. HARTLINE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 673-679) is reported at 94 F. Supp. 1011. The opinion of the Court of Appeals (R. 682-691) is reported at 189 F. 2d 476.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1951 (R. 692), and a petition for

rehearing (R. 693-706) was denied on July 7, 1951 (R. 707). The petition for a writ of certiorari was filed on July 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 242—making it a federal offense for any person, acting under color of law, wilfully to deprive another of rights, privileges, or immunities secured by the Constitution—is violated by state peace officers who hand over to a mob, with whom they are acting in concert, persons under arrest and in their custody for the purpose of having the mob physically beat and torture such persons.

2. Whether a mistrial declared by the District Court, following failure of the jury to agree upon a verdict, bars a new trial of the same defendants under a superseding indictment.

3. Whether the trial court committed reversible error in its instructions to the jury, in its rulings upon the evidence, or in its refusal to direct a verdict of acquittal.

4. Whether petitioners were deprived of their right to be tried by a jury of twelve merely because the alternate juror, who had been excused by the court, entered the jury room for the purpose of obtaining his hat or coat, before the jury began its deliberations.

5. Whether the remarks of counsel during the Government's opening argument were so prejudicial or inflammatory as to deprive the defendants of a fair and impartial trial.

STATUTE INVOLVED

Section 242 of Title 18, United States Code, provides in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Count 2 (R. 14-17) of a 3-count indictment (R. 1-20), filed on February 1, 1950, in the District Court for the Northern District of Georgia, charged that on April 2, 1949, in violation of 18 U.S.C. 242, petitioners John William Lynch, the Sheriff of Dade County, Georgia, and William N. Hartline, a Deputy Sheriff of Dade County and a police officer of Trenton, Georgia, together with two other deputy sheriffs, acting under color of the laws of the State of Georgia, wilfully and knowingly subjected seven named victims to the deprivation of rights, privileges and immunities secured to them by the Fourteenth Amendment. The rights of

which each victimized person had allegedly been deprived were the rights: (1) not to be denied the equal protection of the law; (2) to be immune, while in the custody of the defendant officers, from illegal assault and battery and torture by the officers and persons acting in concert with them; and (3) while in such custody, not to be subjected to trial by ordeal and cruel and inhumane treatment and punishment, but to have a trial in accordance with law and due process. Specifically, it was charged that the officers arrested the seven victims and then handed them over to the non-officer defendants and a large number of robed and hooded persons who carried away the victims and beat them, the officer defendants having "wilfully and knowingly failed and refused to afford equal protection of the law" to the victims, and "failed and refused to afford [them] any protection of the law whatsoever." It was further alleged that "all the acts and things herein in this count alleged and set out were wilfully and knowingly done by the defendants aforesaid for the purpose of denying and depriving the said named 'persons' of the aforesaid rights, privileges and immunities secured to them as aforesaid."[1]

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[1] Count 1 (R. 1-14) charged the same defendants with having violated 18 U.S.C. 371 by having conspired to violate 18 U.S.C. 242. The alleged objects of the conspiracy were the commission of the substantive offenses charged in count 2 and the intimidation of Mamie Clay and other persons by the burning of crosses, the invasion of their homes, and the holding of public demonstrations by hooded bands. Count 3

Following a trial by jury, petitioners were found guilty on count 2 (R. 22). Each was sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 651, 652). On appeal to the Court of Appeals for the Fifth Circuit, the convictions were unanimously affirmed (R. 692).

The evidence adduced in support of the allegations in the indictment is reviewed in the opinions of the District Court (R. 678-679) and the Court of Appeals (R. 689-690). It may be briefly summarized as follows:

Petitioners were sheriff and deputy sheriff of Dade County, Georgia (R. 368, 322). They were members or active associates of the Ku Klux Klan (R. 50, 51, 53, 66, 68). Pursuant to plan and prearrangement, on April 2, 1949, they and other officers named as defendants, followed by a procession of automobiles carrying the other defendants and 50 to 75 hooded and robed persons, proceeded in defendant McCauley's car to Hooker, Georgia, where Mamie Clay, a colored lady, resided (R. 45-46, 49, 51-52, 119, 174, 282-283). The hooded persons assembled on a vacant lot across the road from Mamie Clay's home where they burned a cross that earlier had been built by petitioner Hartline and other persons (R. 79-81, 109, 119-120, 153). Petitioners, acting as and evincing power and authority

(R. 17-20) charged the defendants with having subjected Mamie Clay to the deprivation of her rights under the Fourteenth Amendment by the invasion of her home.

as officers of the law, were present and acting in concert with the hooded mob while the cross was burning (R. 81, 162-164, 185, 326-327, 372-373). Shortly thereafter most of the hooded mob marched onto Mamie Clay's property and ordered all persons in her house to leave (R. 79-80, 96-98, 107-108, 120-121, 153, 164). Petitioners at this time arrested and took into their custody the seven victims (who were colored) named in count 2 of the indictment, who were visiting at Mamie Clay's house (R. 79-81, 90-100, 118-126, 152-157, 161-165, 182-191, 372). Petitioner Lynch heard an unidentified person in a robe order Mamie Clay out of her home and then lecture her as to the impropriety of the "wild parties" she had allegedly conducted or condoned (R. 121-122). Both petitioners were present when a group of the hooded and robed persons seized the seven victims for the ostensible purpose, as petitioner Lynch said, of taking them to jail, and tried to place them in an automobile owned and driven by defendant McCauley in which all the officers had traveled to Mamie Clay's house (R. 122-123, 153-155, 165-166). Petitioners and the other deputies acted with the mob while the victims were being searched and helped the mob put five of the victims into McCauley's car before it was found that the car would not hold all seven victims (R. 123-124, 165-166, 231). It was petitioner Lynch who told the mob not to put the victims in McCauley's car, but to place them in another auto-

mobile (R. 187-188). The petitioners and the other officers were present when the victims were finally placed in the station wagon owned by defendant Robert Keener (R. 122-123, 283-284). Petitioner Hartline, wearing a police officer's uniform, held the door of the station wagon open to facilitate the loading, and petitioner Lynch, not in disguise but acting as the sheriff at all times, was standing nearby observing the operation (R. 122, 188, 231-232). In fact, petitioner Lynch walked away when victim Roberts asked him as the sheriff to help them after a member of the mob had said that they were going to hang the victims (R. 122-123, 126).

Following the loading of the station wagon with the victims, defendant McCauley's automobile left Mamie Clay's property with the station wagon immediately behind and followed by a procession of automobiles carrying the other defendants and the unidentified members of the mob (R. 124, 155-156, 166, 188). The procession traveled a short distance down the road when it stopped and a number of the hooded persons removed the seven victims from the station wagon, ordered them to remove their trousers, and whipped them one at a time (R. 125-126, 155-156, 188-189), with no interference of any kind from petitioners or the other officers (R. 126). Each victim was held by two men and whipped with a long belt, rope, and sticks and then ordered to run (*ibid.*, R. 189-190). After these demonstrations and brutal whippings, the hooded

mob returned to Trenton, Georgia, without any interference, as did the petitioners and the other officer defendants who drove in defendant McCauley's car (R. 179-180). Further demonstrations were held in Trenton by the hooded and robed individuals which the petitioners observed without making any effort to identify any person or take any action at apprehending the wrongdoers (R. 181, 315-316, 342). When the petitioners and the other officers arrived back in Trenton, they proceeded immediately to defendant Wheeler's restaurant, which was known to be headquarters of the local Ku Klux Klan officers (R. 174, 179-180, 249).

ARGUMENT

1. The decision below is correct, and no question requiring further review is involved. The facts of this case present a clear violation of 18 U.S.C. 242 (*supra*, p. 3), and as applied here, there is no question as to the validity of that section. *Williams* v. *United States*, 341 U.S. 97; *Screws* v. *United States*, 325 U.S. 91; *Catlette* v. *United States*, 132 F. 2d 902 (C.A. 4); *Pullen* v. *United States*, 164 F. 2d 756 (C.A. 5).

Count 2 of the indictment charged petitioners with having wilfully subjected the victims to the deprivation of rights, privileges and immunities substantially similar to those alleged in the *Screws* and *Williams* cases, the essence of which is the right and privilege not to be subjected to summary punishment at the hands of officers of the state, but

rather to be entitled to a fair trial in accordance with due process of law. This Court held in the *Williams* case that, to overcome any possible doubts as to the adequacy of the standard of guilt, "the purpose must be plain, the deprivation of the constitutional right willful" (341 U.S. at 101). In the case at bar, the jury, pursuant to correct instructions which if anything were too favorable to the defense,[2] found in effect that the petitioners' pur-

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[2] The trial court's charge was full and adequate on the question of wilfulness; thus, at. R. 614-615:

"You will also notice that Section 242 requires that the act therein made illegal must be committed wilfully. The word 'wilfully' appearing in this statute has a meaning and a very distinct and definite meaning that must be carefully considered by you. The use of the words 'wilful' and 'wilfully' imply a conscious purpose to do wrong. It means doing a thing knowingly and wilfully. It implies not only a knowledge of the things done, but the determination to do it with a bad intent or evil purpose, or both. It is not sufficient to show that the defendants here had a general bad purpose in doing the things they did. *It is necessary for you to find the defendants had in mind the specific purposes of depriving one or more of said persons of a Constitutional right as alleged in the indictment.*

* * * * *

"One of the most vital questions in this case is this: Did defendant Lynch, the sheriff, and his deputies, Hartline, Bleckley, and McCauley, surrender any of the alleged seven prisoners to the other defendants and other persons dressed in hoods and robes with such wilful intent to deprive them of a fair trial, and to subject them to trial by ordeal? * * * If you find that defendant Lynch and his deputies, or any of them, having in their custody as officers of the law, any of the alleged victims, and that they delivered or surrendered such victims to the other defendants and said hooded persons, or either of them, it becomes very material to determine whether this was done by the defendant officers with wilful intent to deprive such alleged victims of their Constitutional rights elsewhere referred to [see R. 607, 608-609, 611, 612, 614, 617]. In passing upon this question of intent, you should consider

poses in turning the victims over to the mob and acting with the mob were plain, and that the deprivations of their rights were wilful.

Petitioners contend that a novel question is presented because, among the rights and privileges enumerated in count 2, the right to the equal protection of the laws was included. However, as the court below held, this allegation expresses the nature of part of the charges against petitioners, to wit, that they knowingly and wilfully failed to afford to the victims the protection to which they were entitled under the law from peace officers invested with the duty, as well as the authority, to protect all persons within their jurisdiction from mob violence. Whatever complexities may exist with respect to the scope of the equal protection clause in other contexts, there can be no question that a law enforcement officer who deliberately turns a particular group of persons over to a mob for the purpose of having them beaten and tried by ordeal is denying them the protection of the laws which he is under a duty to extend to all persons

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not only the relationship existing between said officers and such other parties, but also consider the duties of the officers under the law which the Court will give you, though I charge you the defendant officers are not being tried for failure to perform any of these duties." See also R. 618, 619, 621, 634, 637, 642. (Italics supplied.)

equally.[3] The trial court in its opinion correctly observed (R. 677):

> Persons under arrest are entitled equally with other persons under arrest, to a trial by due process, and when found guilty, they are subject to the same punishments. A prisoner unlawfully beaten by an arresting officer is denied the right of due process of law and also right of equal protection of the laws.

2. Petitioners and their co-defendants were originally indicted in two counts on August 3, 1949 (R. 32-37) for the misconduct upon which the present indictment is based. The first count alleged a violation of Section 241 and the second a violation of Section 242, 18 U. S. C. The defendants were tried before a jury, but when it became apparent after 48 consecutive hours of deliberation that the jury could not agree upon a verdict, the judge discharged the jury and declared a mistrial (see R. 673). Neither petitioners nor any defendant in-

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[3] "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Strauder* v. *West Virginia*, 100 U.S. 303, 310. In *Catlette* v. *United States*, 132 F. 2d 902, 907 (C.A. 4), it was stated:

"And since the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who assaulted the victims constituted a violation of his common law duty, his dereliction in this respect comes squarely within the provisions of 18 U.S.C.A. § 52."

terposed any objection to the termination of this trial. Subsequently, the grand jury returned the indictment in this case, count 2 of which is substantially similar to count 2 of the earlier indictment.

The trial which was terminated by disagreement of the jury did not bar trial under the second indictment. Petitioners were not, of course, acquitted of any charges in the first trial. They had not been placed in jeopardy within the meaning of the Fifth Amendment, since it is clear that the trial judge could, even without consent of the defendants, discharge a jury which was unable to agree upon a verdict and impanel a new jury. *United States* v. *Perez,* 9 Wheat. 579; *Simmons* v. *United States,* 142 U.S. 148; *Logan* v. *United States,* 144 U.S. 263, 298; see also *Wade* v. *Hunter,* 336 U.S. 684, 688-690, and cases cited. It is also well established that the finding of an indictment by a grand jury does not place the accused in jeopardy, and that the pendency of several indictments arising out of the same transaction does not offend the Fifth Amendment. *United States* v. *Haupt,* 152 F. 2d 771, 795 (C.A. 7), affirmed, 330 U.S. 631; see also *United States* v. *Ball,* 163 U.S. 662, 672; *United States* v. *Fox,* 130 F. 2d 56, 58 (C.A. 3), certiorari denied, 317 U.S. 666. Had the Government chosen to have petitioners retried under the original indictment, they would have had no basis for complaint. That a superseding indictment was returned and trial

held thereon does not affect their status before the law so as to permit them to invoke the protection of the Fifth Amendment.[4]

3. (a) The Court of Appeals correctly ruled (R. 689, 690) that "There is substantial evidence to support the verdict" against petitioners, and "The evidence was sufficient to sustain the verdict * * *." As appears from the facts set forth in the Statement, the evidence in support of the allegations of the indictment is overwhelming. Since there is substantial evidence pointing to the guilt of petitioners, this Court will not weigh the evidence nor pass upon the credibility of witnesses, even though there is some conflicting testimony in the record, *Stilson* v. *United States,* 250 U.S. 583, 588; *Goldman* v. *United States,* 245 U.S. 474.

(b) Petitioners were tried under a three-count indictment, count 1 of which charged a conspiracy under 18 U.S.C. 371. Although they were acquitted under this count, the evidence which was admitted thereunder did not become improper upon rendition of the verdict, since the joinder of offenses and of the defendants was proper and authorized.

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[4] Since the Court of Appeals in *Williams* v. *United States,* 179 F. 2d 644 (C.A. 5), had on January 10, 1950, held that Section 241 may not be used to enforce rights guaranteed by the Fourteenth Amendment, the indictment in issue was returned on February 1, 1950, charging a violation of Section 371, instead of Section 241, for the conspiracy. (See *United States* v. *Williams,* 341 U.S. 70.) See opinion of the District Court in the case at bar at R. 673 and opinion of the Court of Appeals at R. 682-683.

See Rules 8 and 13, F. R. Crim. P., and notes of the advisory committee; *Dunn* v. *United States,* 284 U.S. 390, 393; *United States* v. *Biebusch,* 1 Fed. 213, 214 (C.C. E.D. Mo.). In connection with count 1, the Government was properly permitted to show that the conspiracy existed even before petitioners joined it, since they could be found guilty if it were established that they joined the conspiracy at a later date, *Deacon* v. *United States,* 124 F. 2d 352, 358-359 (C.A. 1), *Rudner* v. *United States,* 281 Fed. 516, 519-520 (C.A. 6), certiorari denied, 260 U.S. 734. Thus the testimony of Mamie Clay which is objected to was quite relevant and admissible (R. 75, cf. 76-104). One of the basic rules of conspiracy is that, "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances'," *Glasser* v. *United States,* 315 U.S. 60, 80. Accordingly, testimony bearing upon any of the circumstances surrounding the conspiracy, its motives, objects and intentions, is clearly admissible. See *Pinkerton* v. *United States,* 328 U.S. 640; *Moore* v. *United States,* 150 U.S. 57; *Davidson* v. *United States,* 274 Fed. 285, 287 (C.A. 6).

(c) The trial judge did not err in his charge to the jury in any respect; the charge covered every phase of the case and included proper instructions as to the statute involved (R. 609, 612, 646), the element of specific intent required under Section 242

(R. 607, 611, 614-616, 618, 619, 621, 634, 637, 642), and the nature of the constitutional rights involved (R. 607, 608-609, 611-612, 614, 617).

The instructions made it clear that the offense alleged in count 2 of the indictment was wilfully subjecting an inhabitant to the deprivation of rights secured by the Constitution, the first of two offenses set forth in Section 242 (R. 609).[5] The other offense proscribed by the statute, wilfully subjecting an inhabitant to different punishments on account of his alienage, race or color, had no part in the case, was not charged in the indictment, and was not adverted to by the trial judge at any time. (See R. 608-611.) That the race of the victims "was apparent to the jury from the beginning of the trial" (Pet. 15-16) could not very well have been avoided, even had the Government prosecuted the case without complaining witnesses.

The refusal of the trial judge to give supplemental instructions requested by petitioners was proper in the circumstances, since the requested instructions had either been given in the charge or were incorrect (see R. 638-640). The law does not require the judge to reiterate adequate instructions which have been given in proper context, *Wright* v. *United States,* 175 F. 2d 384, 388 (C.A. 8), certiorari denied, 338 U.S. 873; *Himmelfarb* v. *United States,* 175 F. 2d 924, 951 (C.A. 9), certiorari denied, 338 U.S. 860.

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[5] See *United States* v. *Classic,* 313 U.S. 299, 326-327.

4. Immediately after the thirteenth juror was excused by the trial court, petitioner's counsel called to the attention of the court that this person was then in the jury room (R. 637). The court immediately instructed the Marshal to "go in there and see that the alternate juror merely gets his hat or coat and retires" (R. 637). There is nothing in the record to indicate that the momentary presence of the alternate juror in the jury room might have prejudiced petitioners or influenced the jury in any manner. In any event, the jury had not yet begun its deliberations when the alternate juror was discovered to be in their room (R. 636, 637, 644). "We must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court," *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C.A. 7), certiorari denied, 327 U.S. 794.

5. The remarks of the Special Assistant to the United States Attorney which are the subject of complaint by petitioners were made during opening argument,[6] and they later proved to have relevance to the testimony and the record (R. 603,

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[6] "When that happens in this State, and when it is not suppressed, what does it lead to? It leads to an over-throw of the constitutional government. There is no difference between these subversive organizations, except in the way they work: The communists are trying to seize this government by infiltration. The Ku Kluxers are trying to take over this government and overthrow it by force and arms, and murder and whippings, and lashes and pistols. What is the difference? The results that they achieve are the same" (R. 603).

cf. R. 177-178; Government's Exhibit No. 3). Petitioners had ample time to reply thereto and to request the judge to overcome any possible prejudicial effect they may have had. However, regardless of the manner in which the remarks are viewed, they were not improper, inflammatory, or prejudicial, and there was no "misconduct * * * pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential," *Berger* v. *United States,* 295 U.S. 78, 89. Cf. *Viereck* v. *United States,* 318 U.S. 236, 247-248, dealing with a prosecutor's closing remarks. There is nothing in the record to indicate that the incident in question deprived petitioners of a fair trial.

CONCLUSION

The judgment below is clearly correct under *Screws* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97. There is no conflict of decisions, and there is no unsettled question of importance involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 951742 89